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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1252

MRS. JOHN DE RAISMES STOREY, et al.,
Petitioners,

vs.

WILLIAM T. MAYO, Chairman, and EDWIN L. MASON, and JERRY W. CARTER, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, et al.,
Respondents.

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

INTRODUCTORY STATEMENT

This is a petition to this Court by Mrs. John De Raismes Storey, et al., seeking the issuance of a writ of certiorari to review the judgment of the Supreme Court of Florida entered on November 6, 1968 and reported in 217 So.2d 304. Although petitioners in this proceeding do not

designate Florida Power & Light Company (hereinafter sometimes referred to as the Company) as a respondent, the record reflects (Pet.App. p. 4) that the Company was a party in the Supreme Court of Florida and the Company, therefore, assumes that it has status to file a brief in this Court.

In this brief all emphasis is supplied unless otherwise indicated and the following symbols will be used:

"Pet.App." is the reference to petitioners' Appendix;

"R." is the reference to the record which was before the Supreme Court of Florida, which petitioners' counsel informs us has been transmitted to this Court.

QUESTION PRESENTED FOR REVIEW

Whether the Petitioners Have Any Right (Protected by the Fourteenth Amendment to the Federal Constitution) to Service by a Particular Utility Merely Because They Deem It Advantageous to Themselves.

STATEMENT OF THE CASE

Petitioners' statement is argumentative and incomplete. The Company, therefore, restates the case as follows.

This action was initiated on September 20, 1967, by an application of the Company for approval of a territorial agreement with the City of Homestead relative to service areas (R. 3-13).

Thereafter, on October 9, 1967, the respondent-Commission published a notice of hearing advising the public with respect to the hearing which was held in the City of Homestead (R. 14).

All persons subject to the agreement had previously been contacted by either the Company or the City, so there is no question as to the adequacy of notice (R. 117).

On November 8, 1967, a public hearing was held by the Commission. At that time the Company established by uncontroverted evidence that the proposed territorial agreement was in the public interest in that it minimized, and at times eliminated, unnecessary and uneconomical duplication of plant and facilities, which duplicate facilities resulted in higher rates that the public must pay for essential services (R. 30). The Company further established that the territorial agreement would promote safety in that it would enable the Company and the City to avoid congestion of facilities [duplication, commingling, crisscrossing, overlapping, and paralleling of lines (R. 32)] on the streets and public ways. It was further established that implementation of the territorial agreement would enable the Company and the City to further maintain a higher quality of service and would enable the Company and the City to avoid bad customer relationships (R. 31).

The evidence of the City was to the same effect (R. 60-64).

As previously noted, the foregoing evidence was uncontroverted.

At the hearing seven protestants appeared for the purpose of objecting to the transfer of certain customers incident to the territorial agreement. However, none of the protestants contended that the agreement was not in the public interest (R. 86-102). In fact, one of the protestants expressly recognized the need for the elimination of duplicate facilities (R. 96). The theme of the protestants was that the Company gave better service and had a better rate structure and that the duplication of facilities should be eliminated by transferring everybody to the Company.

The Company was most gratified by the reaction of the protestants and is indeed sorry to lose even a single customer. However, as the record here reflects, the territorial agreement in question had been under negotiation for many years and the only way that the Company was able to work out an agreement with the City of Homestead was to surrender some of the customers in the area of duplicate facilities. This agreement, therefore, represents a compromise, though unpalatable to some, which was necessary to achieve an end beneficial to the greatest number of people.

In due course, on December 1, 1967, the Commission entered its Order No. 4285 approving the territorial agreement (Pet.App. pp. 32-39, R. 114-122).

The rationale of the Commission's Order (Pet.App. p. 34, R. 116-117) is hereinafter set forth:

> "Testimony adduced before the Commission indicated that there are presently duplicate electrical facilities maintained by the Company and the municipality in certain areas in Dade County where the facilities of the two utility systems are contiguous or coincide. In view of the anticipated growth of the areas embraced in the proposed territorial agreement, further duplication of service is to be anticipated unless separate service areas are agreed to by the two utility systems. Further, the overlapping of these service areas naturally creates wasteful expenditures on the part of each of the utility systems in installing and maintaining duplicate transmission and distribution lines. The elimination of duplicate lines would enhance the appearance of the involved areas. Duplicate lines result in an unnecessary hazard to the safety of employees of the utility systems and to the general public, since the lines of one utility necessarily cross the lines of the other at certain points. Further, the witnesses for the two utility systems agreed that by eliminating the necessity for duplicate service in the affected

areas, such utility would be enabled to develop and plan its respective future growth in a more orderly manner in order to adequately provide for the service needs of the rapidly growing area of Dade County. In short, the parties to the proposed territorial agreement concur that it will result in the provision of high quality electric service to all of the customers on both systems."

On December 20, 1967, the petitioners filed a Petition for Reconsideration (Pet.App. pp. 40-43, R. 122-127) which was denied by Order No. 4308 on January 19, 1968 (R. 128-129).

The petitioners then filed a Petition for Certiorari with the Supreme Court of Florida (Pet.App. pp. 46-51).

In due course the Supreme Court of Florida affirmed[1] (Pet.App. pp. 1-13, 217 So.2d 304).

The gravamen of the Supreme Court of Florida's decision is as follows (Pet.App. p. 9):

"An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

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1. The decision of the Supreme Court of Florida which is set forth in petitioners' Appendix also confirms the factual recitation heretofore set forth in the Statement of the Case.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. No substantial federal question is raised by petitioners' Petition for Writ of Certiorari.

It has long been settled by this Court and really requires no citation of authority that this Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record that a substantial federal question is not only presented to this Court but was presented for decision to the highest court of the state having jurisdiction. It is also necessary that the federal question be actually decided by the state court involved. See *Southwestern Bell Telephone & Telegraph Co.* v. *State of Oklahoma,* 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528; *Grisanti* v. *City of Cleveland, Ohio,* 371 U.S. 68, 9 L.Ed.2d 119, 83 S.Ct. 111; *Wetzel* v. *Ohio,* 371 U.S. 62, 9 L.Ed.2d 26, 83 S.Ct. 111; *Seaboard Air Line Railway* v. *Watson,* 287 U.S. 86, 77 L.Ed. 180, 53 S.Ct. 32.

In this cause it is respectfully submitted that no substantial federal question has been presented to this Court. In fact, petitioners' assertion of a federal question appears to be so unsubstantial as not to really require further argument.

Significantly, the petitioners in their jurisdictional statement are unable to point to any authority in support of their position.

Petitioners primarily rely on this Court's decision in *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836. With all due respect to learned counsel for petitioners, the *Kraemer* case, *supra,* relates to what constitutes state action in the field of enforcing restrictive covenants. This would seem to be completely irrelevant to the issue presently before this Court.

As the Supreme Court of Florida pointed out (Pet.App. p. 9):

> "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

The foregoing would seem to dispose of petitioners' contention that they have somehow been denied equal protection because they can no longer purchase power from Florida Power & Light Company.

Petitioners argue that they have been denied equal protection because the territorial agreement tends to remove them from regulatory protection. As the Supreme Court of Florida pointed out, they still have recourse, where necessary, to the municipality or to the courts. Under the territorial agreement they are treated the same as all other members of the class.

II. In addition, petitioners did not raise the question of the validity of Section 366.11, Florida Statutes, before the State Supreme Court.

In their petition before this Court, petitioners urge that Section 366.11, *Florida Statutes,* is unconstitutional. This is the statute which exempts municipal-owned utilities from regulation by the Florida Public Service Commission.

Not only does the petition fail to raise a substantial federal question with respect to the statute, but a perusal of the decision of the Supreme Court of Florida (Pet.App.

pp. 1-13) as well as the decision of the Florida Public Service Commission (Pet.App. pp. 32-39) reveals that the validity of this statute was never presented to those bodies. See *Whitney* v. *State*, 274 U.S. 357, 71 L.Ed. 1095, 47 S.Ct. 641; see also *Simmerman* v. *State*, 116 U.S. 54, 29 L.Ed. 535, 6 S.Ct. 333.

Petitioners' "string citation" set forth on page 10 of the petition is so inapposite as to not require further response. The cited cases simply have no bearing on the issue here before the Court.

III. No public interest will be served by permitting review of the lower court's decision.

As reflected by the Florida Public Service Commission's order and the decision of the Supreme Court of Florida, the public interest here is served by the approval of the territorial agreement involved. The rights of the petitioners are adequately protected and no public interest will be served by permitting a review of the Supreme Court of Florida's decision.

CONCLUSION

For the foregoing reasons Florida Power & Light Company requests that petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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